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Busting the “Fuzzbuster”: Rethinking Bans on Radar Detectors

I. Introduction

Radar detectors are radio receivers, tuned to the frequency of police speed-measuring radar, which alert their users that their vehicles are about to pass through a field of electronic surveillance.¹ This warning enables drivers to check their speed to determine whether it is within the legal limit. At present, three jurisdictions prohibit the use of radar detectors—Virginia, Connecticut, and the District of Columbia.² Although critics argue that radar detector bans run counter to sound policy and raise legitimate constitutional questions, courts reviewing these legislative bans have tersely dismissed these questions of law and policy, upholding the bans in each case.³

This Comment analyzes the policy questions and legal issues raised by a legislative ban on radar detectors and argues that neither state legislatures nor Congress should prohibit the use of radar detectors. Part II briefly discusses the reasons that cause motorists to purchase such devices as well as the reasons that motivate lawmakers to prohibit them. Part III surveys the law in its present state and introduces examples of legislation that have been proposed in Pennsylvania and the United States House of Representatives. Part IV addresses the constitutional issues raised by legislative bans and the judicial treatment of these issues. Part V discusses policy obstacles to the devices' prohibition and suggests that these policy obstacles, together with constitutional implications, should persuade legislatures that radar detector bans are not desirable.

II. Background

In 1974, Congress responded to a perceived national energy crisis by enacting the national fifty-five mile-per-hour speed limit as an emergency fuel savings measure.⁴ Since its inception millions of motorists have chosen to ignore the limit;⁵ yet, until recently, the un-

1. *People v. Gilbert*, 414 Mich. 191, 206, 324 N.W.2d 834, 840 (1982).

2. See *infra* notes 25-27 and accompanying text.

3. See *infra* notes 25-57 and accompanying text.

4. See *Impact and Implementation of the 55-Mile-Per-Hour Speed Limit: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 100th Cong., 1st Sess. 3 (1987) (statement of Gov. Bangerter (R.-Utah)).

5. See *id.*

popular law remained in effect for purported safety reasons.⁶ Congress' decision to allow states to raise the speed limit to sixty-five miles per hour on rural interstates⁷ attests to the depth of the law's unpopularity.

The most widespread means of enforcing the speed laws is radar,⁸ which enables police to monitor the speed of vehicles outside visible range.⁹ Police radar is less expensive and less sophisticated than its military counterpart;¹⁰ more importantly, police radar is often inaccurate.¹¹ Motorists, faced with what they perhaps considered inappropriate speed limits, sought to protect themselves from police radar's widespread use and frequent inaccuracy, as well as from the consequences of speeding violations.¹² One means of protection was the radar detector, and motorists have purchased over six million of these devices.¹³ Dale Smith, the inventor of the original radar detector, the "fuzzbuster,"¹⁴ was an electrical engineer in the police radar industry, and created the device after receiving a radar-based speeding citation that he believed was issued in error.¹⁵

Opponents of the devices, particularly insurance companies, have maintained that the devices are the equivalent of "burglar's tools" or "drug paraphernalia,"¹⁶ and have demanded radar detector bans. Notwithstanding the absence of empirical data supporting the

6. *See id.*

7. 23 U.S.C. § 154(a) (1988).

8. For example, from January 1, 1979 until August 11, 1979, there were 133,015 speeding arrests in Virginia; of these arrests, 115,195 resulted from the use of police radar. *Bryant Radio Supply, Inc. v. Slane*, 507 F. Supp. 1325, 1329 n.4 (W.D. Va. 1981).

9. Police radar uses the physical concept of the "Doppler Shift," transmitting microwaves that bounce off the most attractive target within range and return to a receiver in the radar unit. The time differential between transmission and receipt is then used to calculate a vehicle's speed. *See Patterson & Trichter, Police Radar 1980: Has the Black Box Lost its Magic*, 11 ST. MARY'S L.J. 829, 834 (1980).

10. *Id.* at 856. Radar's use by the military is an invaluable asset to national defense and undergoes constant development and improvement at great cost. Police radar units, on the other hand, are often rudimentary devices selected through a lowest-bidder procurement procedure. *Id.*

11. *See id.* (extensive review of police radar's shortcomings). For a summary of radar's inaccuracy and its policy ramifications, see *infra* notes 136-56 and accompanying text.

12. Consequences include the immediate cost of fines, the expenditures of time, raised insurance rates or denial of coverage, and suspension of one's driving privileges. *See infra* notes 152-56 and accompanying text.

13. *See Smith, The Finest Open-Mindedness Money Can Buy*, CAR & DRIVER, Apr. 1988, at 92.

14. Manufactured by Electrolert, Inc., 475 Park Avenue South, New York, New York 10016.

15. Telephone interview with Janice Lee, President, Radio Association Defending Airwave Rights, Inc. (Oct. 27, 1988) (the organization is a political organization that supports and lobbies for radar detector manufacturers).

16. *See Smith, supra* note 13, at 92 (quoting Brian O'Neill, President, Insurance Institute of Highway Safety).

proposition that radar detectors decrease highway safety,¹⁷ numerous proposals to ban the devices have been introduced by state legislators.¹⁸ Although these efforts "have not been fruitful in the past 10 years,"¹⁹ Virginia, Connecticut, and the District of Columbia have succeeded in prohibiting these devices.

Both sides of the issue have staunch supporters, but each is guilty of occasional illogic.²⁰ Antidetector arguments are often predicated on safety, even when the available data is unsupportive and contradictory.²¹ Detector supporters maintain that the devices are sold to enable buyers to "check their speed."²² If verifying speed is truly the desired result, manufacturers could achieve equal success by marketing speedometer-activated speed alarms rather than radar detectors.

Despite this occasional illogic, legitimate issues remain unresolved. Judicial decisions often avoid questioning the need for a ban, preferring to defer questions of policy to the legislature.²³ The issue whether to prohibit radar detectors has not seen the last of controversy, as new legislation is constantly being introduced.²⁴ Legislators should look behind the current state of the law and question the assumptions upon which antidetector legislation is based.

III. The Current Status of the Law

A. Jurisdictions Prohibiting Radar Detectors

Statutory bans on radar detectors are in effect in Connecticut,²⁵ Virginia,²⁶ and the District of Columbia.²⁷ This section analyzes various judicial responses to challenges to the constitutional validity of these statutes.²⁸ Courts in all three jurisdictions have consistently up-

17. See Smith, *supra* note 13, at 92.

18. See *infra* note 72 and accompanying text.

19. Smith, *supra* note 13, at 92 (quoting 1986 Maryland State Police Report).

20. See *id.* at 95.

21. See *infra* note 120 and accompanying text.

22. Smith, *supra* note 13, at 95 (quoting Director of Market Planning for Radio Shack, a retailer of radar detectors).

23. See *infra* notes 25-57 and accompanying text.

24. See, e.g., *infra* notes 60, 67-70.

25. CONN. AGENCIES REGS. § 14-137-1 (authorized by CONN. GEN. STAT. ANN. § 14-137(a) (West 1987)).

26. VA. CODE ANN. §§ 46.1-198.1 (1986).

27. D.C. Mun. Regs. tit. 18, § 736 (1981).

28. Connecticut, Virginia, and the District of Columbia are not the only states possessing case law concerning radar detectors.

A driver arrested for using a radar detector in violation of a Michigan law prohibiting the equipping of a vehicle with a "radio receiving set" capable of receiving police transmissions had his conviction overturned when the Michigan Supreme Court concluded that a radar de-

held the constitutional validity of the statutory bans.²⁹ The courts' treatments differ, however, regarding particular provisions within each statute.

1. *Connecticut*.—Connecticut's regulation prohibiting radar detectors,³⁰ promulgated under a grant of statutory authority to the Commissioner of Motor Vehicles to "limit the use of any device or accessory which appears to him to be required for safety . . .,"³¹ was first challenged in *State v. Anonymous* (1979-3).³² The court in *Anonymous* (1979-3) held that mere possession of a radar detector did not come within the regulation's effect; thus, in the absence of proof that the defendant installed or operated the device, the court held that the defendant was not guilty of violating the law.³³

The regulation was challenged on substantive constitutional grounds a year later in *State v. Anonymous* (1980-8).³⁴ The court held that the law was not federally preempted,³⁵ not unduly burdensome on interstate commerce,³⁶ and not unconstitutionally vague.³⁷ The court premised its decision on the grant of authority to the Motor Vehicle Commissioner to prescribe any action bearing a reasonable relationship to public safety³⁸ and, thus, summarily dismissed

detector was not such a receiver. *People v. Gilbert*, 414 Mich. 191, 324 N.W.2d 834 (1982). The *Gilbert* court deferred to the legislature the decision of whether to prohibit radar detectors. *Id.* For the policy arguments involved in the case, see *infra* notes 127-33 and accompanying text.

An Indiana case, *Wallman v. State*, 419 N.E.2d 1346 (Ind. App. 1982), interpreted a similar statute prohibiting police radio reception as not extending to radar detectors. *See also* *People v. Moore*, 92 Misc. 2d 807, 401 N.Y.S.2d 440 (1978) (statute prohibiting portable police radios challenged and upheld as evincing no legislative desire to ban radar detectors); *People v. Faude*, 88 Misc. 2d 434, 388 N.Y.S.2d 562 (1976) (statute prohibiting portable police radios did not apply to radar detectors, which were deemed incapable of transmitting or receiving voice messages); Annotation, *Possession or Operation of Device for Detecting or Avoiding Traffic Radar as Criminal Offense*, 17 A.L.R.4TH 1334, 1338-40 (1982).

29. *See* Fields & Hricko, *Prohibiting Radar Detectors: Legal Issues*, 37 FED'N INS. & CORP. COUNS. Q. 317, 319 (1987); Annotation, *supra* note 28, at 1335.

30. The regulation states: "No device designed to give advance information to a motorist of the use of radar speed-indicating instrument in the area of the highway which such motorist is approaching may be installed or used in any motor vehicle operating on the highways of Connecticut." CONN. AGENCIES REGS. § 14-131-1. *See also* *State v. Anonymous* (1979-3), 35 Conn. Supp. 659, 660, 406 A.2d 6, 7 (1979) (quoting Connecticut regulation).

31. CONN. GEN. STAT. ANN. §§ 14-137(a) (West 1987).

32. *State v. Anonymous* (1979-3), 35 Conn. Supp. 659, 406 A.2d 6 (1979).

33. *Id.* at 663, 406 A.2d at 9.

34. 36 Conn. Supp. 551, 421 A.2d 867 (1980).

35. *See infra* notes 76-86 and accompanying text.

36. *See infra* notes 99-108 and accompanying text.

37. *See infra* notes 87-96 and accompanying text. However, the court granted the defendant a new trial on procedural grounds. *State v. Anonymous* (1980-8), 36 Conn. Supp. 551, 421 A.2d 867 (1980).

38. *Id.* at 558, 421 A.2d at 871.

each constitutional issue.³⁹

2. *Virginia*.—In *Crenshaw v. Commonwealth*,⁴⁰ the Virginia Supreme Court addressed the issue of a statutory presumption permitting conviction of a motorist for the “mere presence of a radar detector . . . despite credible evidence that the device was inaccessible or unavailable for use.”⁴¹ Because the law permitted the application of the presumption as a purely arbitrary mandate, the court found the law violative of due process.⁴²

Virginia’s General Assembly amended the law to require that a power source for the device exist and that the device be readily accessible for use at the time of citation before presence alone could constitute *prima facie* evidence of a statutory violation.⁴³ *Bryant Radio Supply, Inc. v. Slane*⁴⁴ upheld the law as it exists today⁴⁵ against the same constitutional objections raised in the Connecticut case, *Anonymous (1980-8)*.⁴⁶ The court in *Bryant* rejected the notion of a congressional intent to preempt state regulation of this type of radio reception, rejected the notion that the law unduly burdened interstate commerce, and rejected as “all but frivolous” a charge of un-constitutional vagueness.⁴⁷

3. *District of Columbia*.—*Smith v. District of Columbia*⁴⁸ addressed a consolidated appeal from convictions resulting from enforcement of the District of Columbia’s ban on radar detectors.⁴⁹

39. The court found “no conflict” with federal policy, in this case the Federal Communications Act, “no infringement upon the national interest in maintaining a free flow of interstate traffic sufficient to warrant invalidation of this regulation,” and treated the issue of un-constitutional vagueness as speculative and inapplicable because it was immaterial to the specific conduct of the defendant. *Id.* at 558-59, 421 A.2d at 870-71.

40. 219 Va. 38, 245 S.E.2d 243 (1978).

41. *Id.* at 43, 245 S.E.2d at 247. The statute provided that “[t]he presence of [a radar detector] shall constitute prima facie evidence of the violation of this section.” *Id.* at 40, 245 S.E.2d at 246.

42. VA. CODE ANN. § 46.1 (1986).

43. The amended law was validated in *Leeth v. Commonwealth*, 223 Va. 335, 288 S.E.2d 475 (1982), in which a motorist who tried to disconnect and hide his radar detector was nonetheless found guilty when the court concluded that circumstantial evidence, e.g., braking sharply in the presence of police radar, relieved the prosecution of the need to prove that the device was actually in operation.

44. 507 F. Supp. 1325 (W.D. Va. 1981), *aff’d*, 669 F.2d 921 (4th Cir. 1982).

45. VA. CODE ANN. §§ 46.1-198.1 (1986).

46. See *supra* notes 34-39 and accompanying text.

47. *Bryant Radio Supply, Inc. v. Slane*, 507 F. Supp. 1325, 1328-29 (W.D. Va. 1981), *aff’d*, 669 F.2d 921 (4th Cir. 1982).

48. 436 A.2d 53 (D.C. 1981).

49. D.C. Mun. Regs. tit. 18, § 736 (1981) provides:

No person shall, in the District of Columbia, sell or offer for sale, or use or have in his possession in a motor vehicle, any device designed to detect or

The appellants' constitutional arguments, identical to those addressed by the Virginia and Connecticut courts, were rejected.⁵⁰ The court in *Smith*, however, was uniquely strident in its judicial condemnation of radar detectors, stating that "radar detectors have no utility other than aiding an illicit effort to drive in an irresponsible manner, evading society's punishment for such conduct."⁵¹ Further, the court suggested that "the nexus between the prohibition of radar detectors and highway safety is obvious"⁵² and equated the devices with burglars' tools.⁵³

Perhaps the most cogent judicial decision supporting a ban is *Electrolert Corp. v. Barry*.⁵⁴ The court in *Electrolert* tersely dismissed the federal preemption issue raised on appeal, noting its accord with the existing case law,⁵⁵ and instead, pursued the commerce clause issue, concluding, as had the courts in Connecticut and Virginia, that the statute was not unduly burdensome.⁵⁶ The court's analysis was flawed, however, because it failed to conclusively address the District of Columbia's failure to amend its laws forbidding the mere presence of radar detectors within the city limits.⁵⁷

4. *The Common Thread*.—The case law of Connecticut, Virginia, and the District of Columbia reflects an unquestioned judicial deference to state legislatures. In upholding the detector bans, these courts did not require a legislative finding that banning detectors would promote safety; rather, the courts accepted the existence of such a causal relationship. Additionally, the cases failed to address the shortcomings of police radar.⁵⁸ Nevertheless, this favorable treat-

counteract police radar. This section shall not apply to any vehicle or equipment used by the Armed Forces of the United States.

50. *Smith*, 436 A.2d at 53.

51. *Id.* at 59.

52. *Id.* Such a conclusion, however, does not comport with the findings of respected surveys and ignores the absence of a correlation between speed per se and safety. See *infra* notes 117-21 and accompanying text.

53. *Smith v. District of Columbia*, 436 A.2d 53, 59 (D.C. 1981). Even conceding, for the sole purpose of addressing this particular issue, that the only purpose of radar detectors is to facilitate violation of speeding laws, to equate such a minor statutory violation with the serious and criminal violations of carrying "machine guns, sawed-off shotguns, blackjacks, and switchblades," *id.*, is to transcend common sense. See RADIO ASS'N DEFENDING AIRWAVE RIGHTS, INC., ARE RADAR DETECTORS BURGLAR'S TOOLS? (copy on file at Dickinson Law Review office). See also *infra* notes 131-33 and accompanying text.

54. 737 F.2d 110 (D.C. Cir. 1984).

55. *Id.* at 111 n.2.

56. *Id.* at 113-14.

57. The court noted that "the District of Columbia has never threatened to enforce the statute against [innocent possessors] if they engaged in such conduct." *Id.* at 113. See *infra* notes 101-02 and accompanying text.

58. See *infra* notes 135-47 and accompanying text.

ment of detector bans continues to incite new legislative attempts to prohibit radar detectors in other jurisdictions.

B. Recent Legislative Developments

This section examines two recent bills proposing bans on radar detectors. One proposed a ban at the federal level; the other proposed a state ban. Both bills were predicated on the idea that radar detectors are nefarious devices, their only function being to permit a person to break the law.⁵⁹

1. *The Anti-Scofflaw Act of 1987*.—Introduced in the first session of the 100th Congress, the Anti-Scofflaw Act of 1987,⁶⁰ by its very title, announced an intention to severely penalize detector users. The bill provided for penalties and fines exceeding those provided by comparable state legislation⁶¹ and extended the scope of the law's reach to manufacturers.⁶² The bill was referred to the House Committee on Criminal Justice on May 6, 1987, and remained there until the end of the legislative term. Representative Jacobs reintroduced the bill in 1989,⁶³ but the bill was referred to the House Judiciary Committee.

Unquestionably, Congress has the power to enact such legislation;⁶⁴ however, the nationwide criminalization of a segment of the electronics industry and its consumers is arguably unjustifiable and implicates questions of federalism.⁶⁵ Proponents of federalism allege that the issue is best left to state legislatures.⁶⁶ An example of the

59. See Fields & Hricko, *supra* note 29, at 33-34.

60. H.R. 2102, 100th Cong., 1st Sess. (1987) proposed to amend Chapter 2 of title 18, United States Code, by adding the following:

§ 36. Radar Detectors

(a)(1) Whoever manufactures or sells a radar detector in or affecting interstate or foreign commerce shall be fined under this title, imprisoned not more than one year, or both.

(2) Whoever possesses in a motor vehicle in or affecting interstate or foreign commerce a radar detector shall be fined not more than \$10,000 or imprisoned not more than six months, or both.

(b) As used in this section, the term "radar detector" means any device or mechanism to detect the emission of microwaves employed by police to measure the speed of motor vehicles on highways for law enforcement purposes.

61. *Id.* The typical state statute provides for fines commensurate with the crime. *E.g.*, VA. CODE ANN. § 46.1-198.1(a)(2) (1986) ("upon conviction thereof, be punished by a fine of not less than \$25 nor more than \$100.").

62. H.R. 2102, 100th Cong., 1st Sess. (1989).

63. H.R. 224, 100th Cong., 1st Sess. (1989).

64. See *infra* notes 108-15 and accompanying text.

65. See *infra* notes 110-12 and accompanying text.

66. See, *e.g.*, *Impact and Implementation of the 55 Mile-Per-Hour Speed Limit: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works*

state approach is an antidetector bill introduced by the Pennsylvania General Assembly.

2. *The Proposal of the Pennsylvania General Assembly.*—A bill introduced in 1988 by the General Assembly of Pennsylvania⁶⁷ incorporated the experience of Virginia's legislature in its draftsmanship. Specifically, the bill included a "lack of power" subsection that modified the presumption that possession of a radar detector shall constitute prima facie evidence that the person violated the statute prohibiting use of the device.⁶⁸ Such careful tailoring stands in contrast to the "broad-brush" approach of the recent federal legislation, which essentially prohibited possession of the devices.⁶⁹ In addition, the proposed Pennsylvania statute provided for a reasonable fine of \$100 upon conviction.⁷⁰ Like the federal Anti-Scofflaw Act of 1987, the Pennsylvania bill died in committee when the legislative term expired. The failure of both measures reinforces the low priority of detector bans, and questions whether state legislatures need act on the issue at all.

and Transportation, 100th Cong., 1st Sess. 3 (1987).

67. H.R. 2156, Printer's No. 2812, 172d Leg., 2d Sess. (Pa. 1988) proposed to add the following section to title 75 of the Pennsylvania Consolidated Statutes:

§ 6116. Prohibition on use of radar detection devices.

(a) General Rule.—It shall be unlawful for any person to operate a motor vehicle on the highways of this Commonwealth and use any device or mechanism to detect the emission of radio microwaves in the electromagnetic spectrum, which microwaves are employed by police officers to measure the speed of motor vehicles upon the highways of this Commonwealth for law enforcement purposes. The provisions of this subsection shall not apply to any receiver of radio waves utilized for lawful purposes to receive any signal from a frequency lawfully licensed by any State or Federal agency.

(b) Presumption.—Except as provided under subsection (c), the presence of any such prohibited device or mechanism in or upon a motor vehicle upon the highways of this Commonwealth shall constitute prima facie evidence of the violation of this section. The Commonwealth need not prove that the device in question was in operative condition or being operated.

(c) Lack of Power.—No person shall be guilty of a violation of this section when the device or mechanism in question, at the time of the alleged offense, had no power source and was not readily accessible for use by the driver or any passenger in the vehicle.

(d) Exclusions.—This section shall not apply to motor vehicles owned by the Commonwealth or any political subdivision thereof and which are used by the police of any such government nor to law enforcement officers in their official duties.

(e) Penalty.—A person who violates this section commits a summary offense and shall, upon conviction, be sentenced to pay a fine of \$100 and have the radar detection device confiscated.

68. *Id.*

69. See *supra* notes 60-66 and accompanying text.

70. H.R. 2156, Printer's No. 2812, 172d Leg., 2d Sess. (Pa. 1988). Cf. *People v. Gilbert*, 414 Mich. 191, 209, 324 N.W.2d 834, 843 (1982) (punishment for a civil infraction should be proportionate to the gravity of the offense).

3. *The Legislative Role.*—Despite judicial decisions concluding that the purposes supporting detector bans are obvious,⁷¹ legislatures across the country have rejected over one hundred proposals to ban radar detectors.⁷² Elected representatives have not taken this stance out of ignorance,⁷³ and are not motivated by a desire to boost their home economies.⁷⁴ By contrast, perhaps legislators have consistently refused to enact bans because legitimate constitutional arguments and sound policy reasons exist that outweigh the minimum putative benefits of prohibiting radar detectors. However, legitimate constitutional questions have yet to be conclusively addressed.

IV. Constitutional Obstacles to Radar Detector Bans

A. *The Supremacy Clause*

When Congress has intentionally prohibited state regulation of a particular field or when state regulation is in irreconcilable conflict with the federal regulatory system, a state law may not stand.⁷⁵ At the heart of the federal preemption argument for radar detectors is the contention that the Federal Communications Act of 1934,⁷⁶ which grants the Federal Communications Commission (FCC) authority over both the transmission and receipt of radio signals,⁷⁷ should extend to radar detector reception of FCC-authorized police radar transmissions.⁷⁸ The argument continues that it is every citizen's right to receive radio transmission unfettered by regulation,⁷⁹

71. See *supra* note 52 and accompanying text.

72. Since 1962, legislators in 33 states have rejected more than 110 proposals to ban radar detectors. Telephone interview with Janice Lee, President, Radio Association Defending Airwave Rights, Inc. (Oct. 27, 1988).

73. Proponents of radar detector bans, especially the insurance industry, are vocal, well-organized, and well-funded. Particularly vocal is the Insurance Institute for Highway Safety (IIHS), a well-known insurance trade association. See, e.g., Fields & Hricko, *supra* note 29 (article authored by two IIHS attorneys encouraging states to prohibit radar detectors).

74. A radar detector manufacturer's products are not the result of a large scale, labor intensive manufacturing process that one usually associates with political "pork-barrel" or protectionist legislation.

75. *Smith v. District of Columbia*, 436 A.2d 53, 55-56 (D.C. 1981) (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978)). But cf. *Smith v. District of Columbia*, 436 A.2d 53, 55 n.3 (D.C. 1981) (acknowledging competing definition of preemption; specifically, that Congress preempts state regulation by implication when the pervasiveness of the federal scheme or character of the regulated field suggests a congressional intent to occupy the whole field; and noting that this approach is disfavored by recent Supreme Court cases).

76. 47 U.S.C. § 35 (1962).

77. See 47 U.S.C. § 153(b) (1962) (definition of "radio communications" under the Act encompasses the transmission of radio waves and all things incidental to such transmission, including its reception).

78. See 47 C.F.R. § 90.101 (1987) (regulations governing the license and regulation of police radar transmission frequencies).

79. See 67 CONG. REC. 12335 (1926) (remarks of Sen. Dill supporting an intention to

and the FCC's lack of radar detector regulations implies a federal preemption.⁸⁰ Further, the FCC has explicitly stated that its regulations do not address the subject of radar detectors.⁸¹

Courts have consistently rejected the preemption argument, noting that even an expansive reading of the FCC's regulatory purpose does not reach the use of radar detectors.⁸² To characterize radar detectors' narrow function, that of detecting the presence of a radio frequency devoid of voice or other data, as "communication" is possible only under a "strained construction" of the FCC regulations.⁸³

Various radio receivers in widespread use can tune into police radar frequencies, such as police band "scanner" devices.⁸⁴ Under a similar construction of the federal preemption issue, a state legislature could, by extension, prohibit such devices merely because they can function as receivers of police radar. In addition to enforcement problems, given the wide range of appearances these devices may take, such a prohibition would directly interfere with exclusive federal jurisdiction over radio transmission in its accepted definition, that of conveying voice or data. Although one court called such hypotheticals "second-guessing,"⁸⁵ such conjecture points to the problems inherent in allowing each state to regulate receivers according to what its own courts interpret as "proper" radio transmission.

B. *The Due Process Clause*

In addition to arguing that state legislation banning radar detectors is preempted, ban opponents contend that prohibiting radar detectors violates the Due Process Clause of the federal constitution. Traditionally, courts have addressed due process arguments in two

"keep radio reception free from government restraint in the United States").

80. Title III of the Federal Communications Act provides for "the control of the United States over all the channels of interstate and foreign radio transmissions . . ." 47 U.S.C. § 301 (1962). "Since a radio transmission is meaningless in the absence of a receiver, it logically follows that the federal government would have exclusive jurisdiction over radio receivers as well." RADIO ASS'N DEFENDING AIRWAVE RIGHTS, INC., FCC REGULATION OF RECEIVERS [hereinafter FCC REGULATION OF RECEIVERS] (copy on file at Dickinson Law Review office).

81. FCC Public Notice No. 6138 (Aug. 1, 1985) (copy on file at Dickinson Law Review office). The FCC Public Notice added, however, that "from a policy standpoint the FCC favors authorizing the use of radio, including radars, to promote safety on the public highways or elsewhere").

82. See, e.g., *State v. Anonymous* (1980-8), 36 Conn. Supp. 551, 558, 421 A.2d 867, 870 (1980).

83. *Bryant Radio Supply, Inc. v. Slane*, 507 F. Supp. 1325, 1327 (W.D. Va. 1981), *aff'd*, 669 F.2d 921 (4th Cir. 1982).

84. FCC REGULATION OF RECEIVERS, *supra* note 80. "Scanners" monitor police and fire emergency frequencies, and are in widespread use by private citizens.

85. *Smith v. District of Columbia*, 436 A.2d 53, 56 n.3 (D.C. 1981).

respects: vagueness and arbitrary enforcement. Both arguments center around the interpretation of statutory language. Courts have yet to address the threat of arbitrary and discriminatory enforcement of bans.

Various statutes have survived attacks based on grounds of unconstitutionality.⁸⁶ A given statute is unconstitutionally vague if it "fails to give adequate warning of what activities it proscribes or fails to set out 'explicit standards' for those who must apply it."⁸⁷ The typical radar detector ban prohibits "any device designed to detect . . . police radar."⁸⁸ Devices manufactured and sold as radar detectors are not the only electronic devices on the market that can receive transmissions on the frequencies assigned to police radar.⁸⁹ As such, any legislation banning radar detection devices would necessarily reach other, "legitimate," radio receivers such as transistor radios or police-band "scanners."⁹⁰

A law that conceivably allows the prohibition of a wide range of devices clearly unintentionally included would suggest that it is vague.⁹¹ One of ordinary intelligence who purchases a transistor radio ignorant of its police radar receiving capability would have no reasonable opportunity to learn that the device was prohibited.⁹² Police officers might make haphazard assessments of whether a particular radio receiver falls within the proscribed category. Although admittedly obviously marked and prominently displayed commercial radar detectors overcome this obstacle, devices hidden by the owner or manufacturer are far more difficult to detect.⁹³

The proliferation of stuffed "Garfield" animals attached to car windows⁹⁴ highlights an inventive concealment approach utilized by radar detector operators that further complicates enforcement of a

86. See *supra* notes 37-39, 44-47 and accompanying text.

87. *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973).

88. *E.g.*, D.C. Mun. Regs. tit. 18, § 736 (1981).

89. One police radar manufacturer, Kustom Signals, Inc., issued a sales memorandum listing the various users of the same frequency. These included such disparate devices as telephone relay equipment and electronic oyster-shucking devices. Telephone interview with Janice Lee, President, Radio Association Defending Airwave Rights, Inc. (Oct. 27, 1988).

90. See FCC REGULATION OF RECEIVERS, *supra* note 80.

91. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (decision upholding antipicketing ordinance against void-for-vagueness and overbreadth challenges).

92. See *id.*

93. Remote devices, designed to be concealed under the hood of a car, with the only indication of their presence being a small blinking light on the dashboard, are readily available in the marketplace. See *CAR & DRIVER*, Apr. 1988, at 105, col. 1 (advertisement offering for sale a remote version of a popular radar detector).

94. See *There Shouldn't Be a Big Problem as Long as They Leave the Dice*, Wall St. J., Jan. 18, 1988, at 17, col. 1 (eastern ed.) (article attesting to the doll's status as "the . . . car window ornament of choice").

ban and contributes to its arbitrary enforcement. Police arrested a driver in Ontario, Canada, who had hidden his radar detector inside such a stuffed cat, after a thorough search of his vehicle uncovered wires emerging from the back end of the animal.⁹⁵ Police aware of such shenanigans could presumably stop and search any car sporting a "Garfield" in its window. Surely innocent purchasers of the stuffed animals never realized they were providing the pretext to an intrusive and inconvenient police search.

That such a claim is "all but frivolous"⁹⁶ is belied by easy-to-imagine cases of arbitrary enforcement. Overworked police would stop only those motorists with highly visible units while those with hidden units would presumably continue to violate the law. This is a problem facing any legislative attempt to prohibit the reception of radio transmission.⁹⁷

C. *The Commerce Clause*

1. *State Bans and the Dormant Commerce Clause.*—Any state statute seeking to prohibit radar detectors affects interstate commerce.⁹⁸ Whether a particular statute places an unconstitutional burden on commerce is determined by a balancing test that weighs "legitimate local interest" and the degree of burden.⁹⁹ Courts assign certain priorities to states' interests; highway safety is accorded high priority. Thus, this interest receives great deference in a commerce clause analysis.¹⁰⁰ Accorded such deference, all a state must do is

95. Smith, *The Finest Open-Mindedness Money Can Buy*, CAR & DRIVER, Apr. 1988, at 95.

96. See *Bryant Radio Supply, Inc. v. Slane*, 507 F. Supp. 1325, 1329 (W.D. Va. 1981) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973)), *aff'd*, 669 F.2d 921 (4th Cir. 1982).

97. See *infra* notes 127-33 and accompanying text.

98. *Bryant Radio Supply, Inc. v. Slane*, 507 F. Supp. 1325, 1328 (W.D. Va. 1981), *aff'd*, 669 F.2d 921 (4th Cir. 1982).

On the other hand, Congress unquestionably has the power to ban radar detectors on a national scale under its implied powers. *E.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824). A nationwide ban, however, would create troublesome issues of federalism. See *infra* notes 108-12 and accompanying text.

99. *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976). State laws are most apt to run afoul of the dormant commerce clause when they are based on protectionist rationales. See, *e.g.*, *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Banning radar detectors is not an attempt at economic protectionism, but an effort to improve highway safety, according to its proponents. Therefore, according to the hierarchy of interests protected, it is undeserving of close inquiry; instead, the legislature promulgating such a law is accorded great deference by courts. See *infra* notes 100-01 and accompanying text.

100. See, *e.g.*, *South Carolina State Highway Dep't. v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938) (highway safety regulations that burden or impede commerce can nonetheless be considered constitutionally valid); *Raymond Motor Trans., Inc. v. Rice*, 434 U.S. 429, 443 (1978) ("In no field has . . . deference to state regulation been greater than that of highway

show that its law is rationally related to a safety end to support such legislation.

Arguably, prohibition of the *use* of radar detectors is rationally related to a state's interest in furthering highway safety.¹⁰¹ Forbidding *possession*,¹⁰² however, serves no safety rationale other than to facilitate enforcement of the law.¹⁰³ When faced with an "innocent possessor" hypothetical, such as the shipment of unopened boxes containing radar detectors through a jurisdiction banning their possession, courts have either sidestepped the issue¹⁰⁴ or stricken such a provision from its laws.¹⁰⁵

Pennsylvania's proposed statute avoided this hurdle entirely by requiring the existence of an available power source for the device and by requiring its availability for use.¹⁰⁶ Such a narrowly tailored proposal would presumably survive commerce clause scrutiny.¹⁰⁷

2. *Federal Anti-Detector Legislation and Federalism.*—The Constitution expressly places only a few limits on the power of Congress in the interest of state sovereignty.¹⁰⁸ One such limit is the power of Congress to regulate safety on a state's highways: "[I]t has long been accepted as a general proposition that a state may regulate the use of its . . . highways in the interest of public safety."¹⁰⁹ A federal ban on the use of radar detectors, as proposed by the Anti-

safety regulation.").

101. See *supra* note 100. Such a "rational basis" test is easily satisfied under the very deferential criterion: A court need only satisfy itself that the "local government's safety rationale is not 'illusory' or 'nonexistent.'" *Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984).

102. E.g., D.C. Mun. Regs. tit. 18, § 736 (1981) ("nor have in his possession, in a motor vehicle, any device designed to detect or counteract police radar").

103. Such a narrow end might run afoul of due process provisions against an "arbitrary mandate" of enforcement. See *Crenshaw v. Commonwealth*, 219 Va. 38, 43, 245 S.E.2d 243, 247 (1978) (struck down earlier Virginia radar detector ban as creating an "arbitrary mandate").

104. "We need not decide whether, if the Order indeed extended [to cover such a hypothetical] . . . , it would violate the strictures of the Commerce Clause, for [the jurisdiction banning such possession, in this case, the District of Columbia] has never threatened to enforce the statute against them if they engaged in such conduct." *Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984).

105. *State v. Anonymous* (1979-3), 35 Conn. Supp. 659, 406 A.2d 6 (1979) (construed Connecticut statute prohibiting radar detectors as not forbidding mere possession of the devices).

106. See *supra* notes 67-69 and accompanying text.

107. It remains, however, for legislators to challenge the underlying premise of highway safety when determining whether the law is a good law rather than merely a constitutionally permissible exercise of state police power. See *infra* notes 116-26 and accompanying text.

108. See L.H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-20, at 378 (2d ed. 1988).

109. *Id.* § 6-7, at 417.

Scofflaw Act of 1987,¹¹⁰ would directly impinge upon this doctrine, and could create problems paralleling those that recently befell the national 55 mile-per-hour speed limit.¹¹¹ Specifically, "it is offensive to have the federal government dictate what has traditionally been, and should continue to be, within the purview of the individual states."¹¹²

V. Policy Obstacles to Radar Detector Bans

Even though courts construing antidetector statutes have consistently ruled in favor of their constitutionality, legislators should not draw from this determination a conclusion that radar detector bans are in the public interest. Courts avoid factfinding when a state's regulation of highway safety is at stake,¹¹³ for, upon the invocation of that interest, a court must only decide whether the legislative means are rationally related to the highway safety end.¹¹⁴

This Comment does not suggest that those legislatures that have enacted bans or those legislators actively proposing them do not consider a safety interest when promoting their laws or proposals. Rather, it suggests that laws and proposals should be firmly grounded in findings of fact and weighed against competing constitutional and policy interests before being enacted. Even though over one hundred legislative proposals have been defeated,¹¹⁵ antiradar detector legislation maintains its allure, as evidenced by the recent proposals before the Pennsylvania General Assembly and the United States Congress. It is an allure, however, based on questionable policy considerations. The Maryland Insurance Commission recently conducted such a factual determination, and its conclusions tend to support the need for legislative forbearance.

A. Safety and the Maryland Insurance Commissioner's Decision

In response to a complaint that insurance companies discriminated against radar detector owners, the Insurance Division of the Maryland Department of Licensing and Regulation recently instituted a hearing before the Maryland Insurance Commissioner.¹¹⁶

110. See *supra* notes 60-63 and accompanying text.

111. See *Impact and Implementation of the 55 Mile-Per-Hour Speed Limit: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 100th Cong., 1st Sess. 3 (1987) (statement of Gov. Bangerter (R.-Utah)).

112. *Id.*

113. See *supra* notes 99-101 and accompanying text.

114. See *supra* note 101 and accompanying text.

115. See *supra* note 72 and accompanying text.

116. In the Matter of the Show Cause Hearing on the Use of Radar Detectors, Md.

Maryland's Insurance Commissioner concluded that an underwriting guideline refusing liability coverage based solely on the use or ownership of a radar detector contravened state public policy and was unsupported by factual evidence.¹¹⁷ Although this decision lacks the authority of a definitive proclamation by a state or federal court, it exemplifies the treatment of factual issues in the absence of judicial deference to a state's police power.¹¹⁸

Any legislature contemplating a ban should take the Commissioner's findings of fact into careful consideration. The Commissioner noted that "[w]hile speed *per se* is identified as the primary cause of fatal accidents, it is speed which is inappropriate for road conditions, and not speed in excess of the posted speed limit, that contributes to the accident."¹¹⁹ The Commissioner further noted the existence of a national study comparing the accident rates of radar detector users and nonusers, which concluded that the former drove at least as safely as the nonusers, as measured by the miles driven per accident experienced.¹²⁰ In summary, the Insurance Commissioner's order found that "[s]tudies and testimony establish that the use of radar detectors alone has little or no effect on speed control or highway safety."¹²¹

In determining that a visible patrol car is the most effective method for deterring antisocial, aggressive, or hostile driving behav-

Dept. of Licensing and Reg., Ins. Div., Memorandum and Order No. 814-11/87 (Mar. 17, 1988) [hereinafter Show Cause Hearing] (copy on file at the Dickinson Law Review office). This order was appealed by the Government Employee Insurance Company (GEICO) and on remand, Assistant Deputy Commissioner Thomas Raimondi declared that the order of March 17, 1988 "shall remain in full force and effect." In the Matter of the Show Cause Hearing on the Use of Radar Detectors, Md. Dept. of Licensing and Reg., Ins. Div., Memorandum and Order on Remand No. 815-11/87, Circuit Court Case No. 88078071/CL79023 (July 27, 1989). Again GEICO appealed, this time to the First Circuit Court of Baltimore, which upheld the order as a legitimate exercise of the Commissioner's power. *GEICO v. Insurance Commissioner of the State of Maryland*, No. 89235062 (January 16, 1990).

117. Show Cause Hearing, *supra* note 116, at 15-16.

118. The Commissioner was addressing a question of private insurance law, a factor that was significant to the case's disposition. The insurance companies had to show more than an unsupported "rational basis" for their underwriting guidelines, and failed to do so. This demonstrates that the "highway safety" rationale claimed by proponents of a detector ban is unable to stand unsupported by deference to the legislature.

119. Show Cause Hearing, *supra* note 116, at 7.

120. *Id.* at 8. The study noted that radar detection device users drive an average of 233,933 miles between auto accidents, as compared with 177,554 among nonusers. The survey also compared seatbelt use between detector users and nonusers, finding that the former were 12% more likely to use seat belts for both short (under 10 miles) and long distances. The survey has a statistical margin of error of 5%. Yankelovich Skelly & White/Clancy Shulman, Inc., *A Comparison of the Automobile Accident Rates of Radar Detection Device Users and Non-Users* (May 27, 1987) (copy on file at Dickinson Law Review office).

121. Show Cause Hearing, *supra* note 116, at 14.

ior,¹²² the Commissioner's decision supports the contention that radar detectors might even promote safety by extending a patrol car's effective range. Police patrolling the nation's highways are interested in safety, not in issuing citations, and any act that has a safety-promoting effect should be encouraged. Arguably, a reckless motorist, alerted by his detector to police radar speed enforcement, would slow down sooner than he would have in the absence of such a warning. The motorist would admittedly avoid a citation; however, his safety, as well as that of other motorists, would improve. This is not an illusory benefit since radar can be detected up to a mile and a half away from its source.¹²³ This effect would achieve the same result as visible patrol cars lining both sides of a roadway for a mile and a half, thereby increasing police efficiency and highway safety.

Furthermore, at the hearing before the Maryland Insurance Commissioner, "[n]o direct statistical evidence" was produced to support the insurance companies' suppositions that motorists who own radar detectors are careless drivers, have more accidents than the average motorist, and utilize these devices solely to avoid speeding citations.¹²⁴ Indeed, the only direct evidence offered tended to show that radar detector owners were actually safer drivers than nonusers.¹²⁵ Legislatures contemplating a ban for safety reasons would do well to take note of the Insurance Commissioner's conclusions. Furthermore, courts examining antidetector legislation in a commerce clause analysis should take these findings into consideration before concluding that a state's safety interest under its police power is "obvious."¹²⁶ The Maryland Insurance Commissioner addressed radar detector possession and highway safety concerns only in the context of insurance underwriting guidelines. Equally important policy issues remain, centering around the prohibition of any radio reception.

122. *Id.* See also 2 R.Q. BRACKETT & M.L. EDWARD, A COMPARATIVE EVALUATION OF SPEED CONTROL STRATEGIES (1977) (Texas Transportation Institute); D. CLEVELAND, SPEED AND SPEED CONTROL (1970) (Highway Safety Research Institute, University of Michigan); W. JOHNSON, D. LEVINE & D. REINFURT, RADAR AS A SPEED DETERRENT: AN EVALUATION (1973) (Highway Safety Research Center, University of North Carolina).

123. Police radar's maximum effective range is approximately 7500 feet, with a beam width of 2580 feet. Patterson & Trichter, *supra* note 9, at 855.

124. Show Cause Hearing, *supra* note 116, at 14.

125. *Id.*

126. See *Smith v. District of Columbia*, 436 A.2d 53, 59 (D.C. 1981). As mentioned in *supra* notes 99-101, it is probably beyond the bounds of a court's power of inquiry to question state policy when a highway safety motive is invoked. Nonetheless, any statistical findings that directly contradict a state's stated goals might allow a court leeway to more carefully scrutinize the competing interests involved.

B. *The Pitfalls of Prohibiting Radio Reception*

In *People v. Gilbert*,¹²⁷ the Supreme Court of Michigan drew a distinction between the values at stake when the monitoring of electronic surveillance is involved and those at stake regarding the enforcement of traffic laws.¹²⁸ In deciding that a Michigan statute prohibiting the reception of confidential police communications did not extend to prohibit radar detectors, the court noted that "[t]he policy considerations that support the proscription of vehicular monitoring of confidential police communications do not necessarily extend to the monitoring of police electronic surveillance."¹²⁹ The court contrasted the former, which seeks to prevent armed criminals from escaping police custody, and the latter, which seeks only to discourage, in the case of radar detectors, the commission of a civil wrong.¹³⁰

The distinction is important and speaks directly to those associating radar detectors with burglars' tools or drug paraphernalia.¹³¹ Sawed-off shotguns and drug syringes foster and encourage socially unacceptable criminal behavior; by contrast, radar detectors offer a means of protection against enforcement of unpopular traffic laws, which many deem within the bounds of civil disobedience. Banning criminal radio reception has a clear-cut and possibly lifesaving rationale; banning radar detectors has a questionable, and possibly illusory, safety-enhancing effect.¹³² Before a decision to prohibit radio reception is enacted, legislators should balance the benefits and the ramifications of prohibiting such reception.

The Michigan court contemplated advances in electronic surveillance and questioned placing its judicial imprimatur on a law regulating the monitoring of such surveillance. Specifically, the court recognized that "[p]ersons who wish, by installing electronic detection devices, to protect themselves against such intrusion and surveillance may not be violating any law but merely fearful that their activities, political and not criminal, have come to the attention of the authorities."¹³³ Radar detectors are obviously not designed to protect unpopular political activities unless, perhaps, motorists are willfully speeding to protest a law they consider inappropriate. Such an idea

127. 414 Mich. 191, 324 N.W.2d 834 (1982).

128. *Id.* at 206, 324 N.W.2d at 841.

129. *Id.*

130. *Id.* at 209, 324 N.W.2d at 840.

131. See *supra* notes 16, 53 and accompanying text.

132. See *supra* note 116 and accompanying text.

133. *People v. Gilbert*, 414 Mich. 191, 207, 324 N.W.2d 834, 842 (1982).

is far-fetched, but illustrates that a legislature empowered to prohibit radio reception in one instance might seek to broaden its scope to include other forms of surveillance monitoring that it deems unacceptable. Next, a legislature might consider that although the scientific principle upon which radar is based is unassailable, the transition from principle to implementation is not always free from error.

C. *Radar's Inaccuracy and Judicial Notice*

Judicial notice is the cognizance of certain facts that judges and jurors may properly take and act upon without proof, because they already accept them as true.¹³⁴ Jurisdictions that have questioned the judicial notice of radar evidence have developed the general rule that, in the apparent absence of a relevant statute, judicial notice might be taken of the general reliability of police radar to measure the speed of motor vehicles.¹³⁵ Courts have carefully drawn the distinction, however, between taking judicial notice of the principle of radar as an electronic device that scientifically and accurately measures the speed of moving objects and taking judicial notice of the accuracy and operating efficiency of the particular radar device used to measure the speed of a defendant's vehicle in a particular case.¹³⁶

The latter distinction is important; radar's inherent weaknesses stem not from the scientific means employed, but from the operator's interpretation of the device's results.¹³⁷ The microwaves radiating from a traffic radar unit have a wide range, and "lock-on" to objects that are often far out of visual range.¹³⁸ Policemen operating traffic radar must often guess which target is the violator, because, as the Texas Department of Public Safety noted, "[r]adar cannot identify the speeding vehicle; the officer must do that."¹³⁹ As early as 1980, commentators urged that legislatures with a view toward promulgating stricter, or at a minimum, uniform standards should seriously consider flaws in radar design and operator training before radar is

134. BLACK'S LAW DICTIONARY 761 (5th ed. 1979).

135. See Annotation, *Proof, By Radar or Other Mechanical or Electronic Devices, Of Violation of Speed Regulations*, 47 A.L.R.3d 822, 832 (Supp. 1989). The 18 jurisdictions according judicial notice to police radar evidence are: Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, New Jersey, New York, Ohio, Tennessee, Texas, Vermont, and Wisconsin. *Id.*

136. *Id.*

137. See Patterson & Trichter, *supra* note 9, at 855.

138. See *id.*

139. CINCINNATI MICROWAVE, INC., CINCINNATI MICROWAVE ENGINEERING REPORT: TRAFFIC RADAR 4 [hereinafter TRAFFIC RADAR] (copy on file at Dickinson Law Review office). Accord THE TRAFFIC INSTITUTE, TECHNIQUES FOR RADAR SPEED DETECTION, Pub. No. 401 (Northwestern University Press 2d ed.).

accorded judicial notice.¹⁴⁰ To date, however, the only standards governing radar accuracy are those adopted by manufacturers. Thus, no governmental standards exist.¹⁴¹

In *Miami Radar Trial of 1979*,¹⁴² the defendants, cited for radar-based speeding violations, spent over \$40,000 amassing more than 2,000 pages of testimony and 33 exhibits in a trial based on the inaccuracy and unreliability of radar.¹⁴³ After examining the evidence submitted by the defendants, the Florida trial judge excluded the radar evidence from trial.¹⁴⁴ Unfortunately, however, the case has had "negligible impact, if any, on other jurisdictions throughout the nation."¹⁴⁵ Few motorists victimized by radar's inaccuracy would choose to mount such an expensive defense; for the average motorist, the only practical course available is to pay the fine and suffer the consequential increase in insurance rates.¹⁴⁶

A professional truck driver, faced with a possible loss of livelihood from erroneous radar-based traffic tickets, has only one means of protection against traffic radar—his radar detector. Prohibiting these devices would leave such a driver virtually unprotected, his only other remedy being a prohibitively expensive courtroom defense. Finally, state legislators contemplating a detector ban may also consider the political effect of such a decision—the effect upon the constituent motorists.

D. *The Negative Effect on Motorists*

How a proposed law will affect its constituents should concern every legislator, with fairness to the public of paramount concern. Actual traffic speeds are determined almost exclusively by consensus, rather than by posted speed limits.¹⁴⁷ All but the most exceptional enforcement efforts to reduce traffic speeds are unsuccessful.¹⁴⁸ Issuing more speeding citations will not force motorists to travel at the posted speed—there is no correlation between the number of citations issued and the average speed of traffic.¹⁴⁹ Furthermore, there is

140. See Patterson & Trichter, *supra* note 9, at 858.

141. TRAFFIC RADAR, *supra* note 139, at 3.

142. State v. Aquilera, No. 711-1015 (Fla. Dade County Ct. May 7, 1979). See Grube, *Radar Speed Measurement: The Controversy Continues*, 54 FLA. B.J. 461 (1980).

143. Patterson & Trichter, *supra* note 9, at 854 n.169.

144. *Id.* at 854.

145. *Id.*

146. See *id.*

147. See TRANSPORTATION RESEARCH BOARD, 55: A DECADE OF EXPERIENCE, SPECIAL REPORT 204, at 147 (1984).

148. See *id.*

149. See *id.*

no correlation between the number of citations issued and accidents caused by speeding.¹⁵⁰ Thus, banning radar detectors and increasing the issuance of speeding tickets would yield few constructive results.

The typical speed on rural highways is in excess of the speed limit.¹⁵¹ Efforts to increase speeding arrests, including banning detectors, may be unpopular to a large part of any legislature's constituency—motorists—who believe that they are driving safely even though they are exceeding speed limits. High mileage drivers in particular, such as travelling salesmen or professional truck drivers, face a dilemma: either drive more slowly than the surrounding traffic to minimize high exposure to police radar surveillance or risk the accumulation of expensive and possibly livelihood-threatening speeding citations. A motorist arrested for speeding must often pay a substantial fine.¹⁵² In addition, accumulation of several speeding tickets might, under a "point" system, result in suspension of the motorist's license.¹⁵³ Such an accumulation would cause increased insurance premiums or might result in a denial of coverage altogether.¹⁵⁴

When radar's inaccuracy is added to such consequences, motorists would likely agree with the opinion of Chief Judge Nesbitt in *State v. Aquilera*.¹⁵⁵ In deciding to exclude radar evidence from the trial in *Aquilera*, Chief Judge Nesbitt stated:

I recognize that many millions of dollars in revenue are involved in "speeding" fines but let it be understood once and for all, the function of the traffic court is to convict the guilty, acquit the innocent, and improve traffic safety . . . not to be merely an arm of any revenue collection office. At the same time if the errors alleged by opponents of radar do exist, then one must wonder — what percentage of these millions of dollars has

150. *See id.*

151. *See, e.g.*, Show Cause Hearing, *supra* note 116, at 8 (citing Department of Transportation statistics for 1986 showing a typical consensus speed of 66 miles per hour on U.S. rural interstates).

152. For instance, in Pennsylvania, a motorist cited for driving 66 miles per hour in a 55 mile-per-hour zone is fined \$74.50. Interview with Sgt. Kiser, Carlisle, Pa. Borough Police (Nov. 15, 1988). *See* 75 PA. CONS. STAT. ANN. § 3362(c) (Purdon 1977) (statutory authorization for the fine schedule).

153. Under Pennsylvania's "points" statute, 3 points are assigned for exceeding the speed limit by 11-15 miles per hour and 4 points for 16-25 miles per hour over the posted limit. 75 PA. CONS. STAT. ANN. § 1535 (Purdon 1977). An accumulation of 11 points results in license suspension pursuant to 75 PA. CONS. STAT. ANN. § 1539 (Purdon 1977). For a look at the particularly harsh consequences of continuing to drive with a suspended license in Pennsylvania, *see* Comment, *Hit and Run: The Paralyzing Effect of Pennsylvania's Habitual Offender Statute*, 93 DICK. L. REV. 167 (1988).

154. *See, e.g.*, Show Cause hearing, *supra* note 116, at 10 (noting the effects of insurance companies' reaction to accumulated traffic offenses).

155. No. 711-1015 (Fla. Dade County Ct. May 7, 1979).

been collected from erroneously convicted defendants? — How many of these defendants have suffered the additional penalties of extremely higher insurance rates, and the unnecessary compiling of points with the consequent loss of driver's licenses and perhaps jobs?¹⁵⁶

Motorists would justifiably resent a paternalistic law prohibiting radar detectors, since these devices provide them with a meaningful and minimally intrusive defense against the expansive consequences of speeding citations and inaccurate radar.

VI. Conclusion

Radar detectors have been the subject of largely uninformed debate, with voices on both sides of the prohibition issue resting their arguments on first impressions and gut-level distinctions. Legislatures contemplating proposed bans should consider the arguments proposed by both sides and weigh the empirical data before hastily enacting laws. The nation's courts are ill-equipped to spend the large amount of time necessary to complete an exhaustive study of the relative data and merits of the issue; therefore, leaving final resolution of the issue to the courts does the average citizen a disservice and may result in the perpetuation of bad law.

The constitutional and policy implications of a ban on radar detectors, coupled with a lack of supportive empirical data, suggest legislative forbearance on this issue. Should legislators decide to pursue efforts to prohibit the devices, however, proposals should become law only after a comprehensive finding that radar detectors negatively affect the safety of motorists and an informed conclusion that this negative impact outweighs the reasons millions of citizens purchase radar detectors.

Nikolaus F. Schandlbauer

156. *Id.*, quoted in Patterson & Trichter, *supra* note 9, at 854.

